

**NP LAKE MEAD LLC d/b/a
FIESTA HENDERSON HOTEL AND CASINO**

and

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 501, AFL-CIO**

Case No. 28-RC-218426

**EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF ELECTION AND CERTIFICATION OF
REPRESENTATIVE**

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Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, NP Lake Mead LLC d/b/a Fiesta Henderson Hotel and Casino ("Fiesta" or "Employer") hereby requests review of the Decision and Direction of Election ("D&DE") issued by the Regional Director on April 27, 2018, and the Certification of Representative ("Certification") (collectively, the "Decisions") issued by the Regional Director on May 16, 2018.

I. INTRODUCTION

The Petitioner, International Union of Operating Engineers Local 501, AFL-CIO ("Union" or "Petitioner"), seeks to represent a unit composed of all slot technicians and utility technicians ("Technicians") at the Employer's facility. A core function of the Technicians' duties is to protect the Employer's property and assets from fraud and theft. Fiesta presented overwhelming and undisputed evidence that the Technicians enforce the Employer's rules and policies to prevent fraudulent payouts; protect against counterfeit currency and "EZ-Pay vouchers"; safeguard the Employer against fraudulent claims of game malfunctions, lost credits, or failure to pay winning hands; verify game settings to ensure that payout percentages have not been intentionally or inadvertently altered; investigate and address machines that display an irregular payout pattern; and protect the Employer from tampering, advantage play, and physical and software vulnerabilities, among other duties. In short, they "enforce against employees and other persons rules to protect [the] property of the employer" and are therefore "guards" within the meaning of the Act. *See* 29 U.S.C. § 159(b)(3).

The Regional Director disregarded this undisputed evidence, focusing instead on the thoroughly discredited notion that only prototypical plant security guards who perform police-like functions – such as physically confronting guests, wearing "guard-type" uniforms and

carrying firearms – are guards under the Act. That reasoning was recently rejected by the D.C. Circuit in *Bellagio, LLC v. NLRB*, 863 F.3d 839 (D.C. Cir. 2017); is inconsistent with the plain language of the Act; departs from historical Board precedent; and, as pointed out in *Bellagio*, is premised on a stagnant view of the Act that fails to account for the “peculiar” realities of an “ultramodern luxury casino.” The Regional Director’s reliance on that reasoning was plain error.

Accordingly, there are compelling reasons to grant this review in that: (1) the Decisions depart from officially-reported Board precedent; (2) the Decisions rely on clearly erroneous and prejudicial factual determinations; and (3) the Regional Director committed prejudicial error. Alternatively, to the extent the Decisions correctly apply Board precedent – namely *Boeing Co.*, 328 N.L.R.B. 128 (1999) – that precedent is simply wrong, inconsistent with the plain language of the Act, conflicts with better-reasoned Board and federal case law, and should be overturned.

II. STATEMENT OF THE CASE

On April 13, 2018, the Union petitioned to represent a unit composed of all Technicians at the Employer’s facility. On April 19, 2018, the Employer filed its position statement, maintaining that the Petition must be dismissed because the Technicians are “guards” within the meaning of the Act. The pre-election hearing was held on April 23, 2018.

During the course of the pre-election hearing, the Employer presented extensive evidence, including the testimony of Eric McMillan, Director of Slot Operations at Fiesta, and Richard DeGuise, a former Nevada Gaming Control Board Agent, that Fiesta Technicians enforce its rules and policies in order to protect its property and assets (*i.e.*, funds).¹ For instance, the Employer presented undisputed evidence that the Technicians:

¹ The Parties stipulated to admitting the transcript of Richard DeGuise testimony from NP Palace LLC and International Union of Operating Engineers Local 501, AFL-CIO pre-election hearing, 28-RC-211644 (Dec. 27, 2017), as Joint Exhibit 1, as the witness’ testimony in this matter would be substantively identical to his prior testimony. (*Id.* at 52:13-53:11; *see also* Ex. E.)

- Maintain, investigate and verify bill validators to protect the Employer against counterfeit currency, counterfeit “EZ-Pay vouchers,” claims that the machine failed to correctly pay or credit a guest, and other attempted theft and fraud that happen on a daily basis. The Technicians are the *only* employees on the Employer’s property with technical expertise to fully investigate such issues; hence, they are relied upon by supervisors on a near constant basis to detect and investigate potential fraud. Without the Technicians, the supervisors *cannot* investigate, verify and resolve the disputes and issues. (Ex. C, Pre-Election Tr. at 20:25-22:2, 22:15-23:5.)
- Protect the Employer from fraudulent claims by enforcing the Employer’s procedures to verify jackpots with a witness in place and sign jackpot verification sheets before payouts. Indeed, the decision of the Employer on whether to payout a jackpot *always* follows the investigation and recommendation of the Technicians. (*Id.* at 23:24-24:22, 37:2-15; *see also* Ex. D, Er. Ex. 3 to Pre-Election Hearing at 2-4.)²
- Protect the Employer from fraudulent claims of game malfunctions, lost credits, or failures to payout winning hands. The supervisors’ final decisions on fraudulent claims are ultimately based on the Technicians’ findings and recommendations. (*Id.* at 19:9-20:24, 23:10-23.)
- Verify settings and keep records of progressive meter amounts anytime a progressive game or bank of games has settings modified and/or hardware adjusted or exchanged to protect the Employer from physical and/or software vulnerabilities and exploits. (*See* Er. Ex. 3 to Pre-Election Hearing at 5.)
- Monitor, investigate and resolve nearly every aspect of slot machines – from physical tampering to destruction to technical settings and data – to prevent cheating or other fraudulent activities; inspect and verify slot machines that have higher-than-expected payout ratios. (*Id.* at 17:19-18:4, 18:24-19:8, 26:15-27:9, 30:6-15, 31:24-32:21; *see also* Er. Exs. 1 and 2 to Pre-Election Hearing.)
- Implement the Employer’s policies to ensure that newly-purchased machines are set up correctly in all aspects; failure to properly verify the settings could expose Employer to significant gaming losses. (*Id.* at 24:24-26:7.)
- Identify and investigate mistakes or intentional misconduct by other Technicians by reviewing machine data and reporting findings to the supervisor. (*Id.* at 36:12-18, 44:9-20.)
- Are entrusted with all types of slot machine access keys, which – if used nefariously – would allow an individual to alter game outcomes and obtain access to the cash within the machine. Without the Technicians, even the security officers *do not* have access to

² All cited transcript pages and Employer exhibits from the pre-election hearing are attached under Exhibits C and D, respectively.

the keys. (*Id.* at 30:16-31:10, 47:23-50:2; *see also* Er. Ex. 3 to Pre-Election Hearing at 1; Ex. E, Jt. Ex. 1 to Pre-Election Hearing at 68:4-14.)³

- Enforce the Employer’s rules and policies against underage gaming, which protects the Employer against both legal liability and the potential loss of its gaming license. (Pre-Election Tr. at 33:10-23.)
- Enforce the Employer’s rules and policies against underage drinking by directly stopping or escalating the matter to security as necessary. (*Id.* at 34:12-19, 42:13-43:3.)
- Make rounds to monitor the casino floor for banned or otherwise unauthorized guests or team members and for any suspicious activities to prevent fraudulent or illegal transactions. (*Id.* at 34:20-35:22.)
- Play an integral and indispensable role in assisting the Nevada Gaming Control Board to investigate gaming irregularities and disputes – indeed, without the Technicians, the Nevada Gaming Control Board *cannot* investigate and resolve the disputes and issues. (*Id.* at 32:22-33:9; *see also* Jt. Ex. 1 to Pre-Election Hearing at 69:23-70:6, 71:2-73:8.)
- Play a critical role in assisting the Nevada Gaming Control Board by forming probable cause to effect an arrest when guests are detained for engaging in attempted theft or fraud. (Jt. Ex. 1 to Pre-Election Hearing at 65:10-14, 73:9-74:6.)

Despite this overwhelming evidence, on April 27, 2018, the Regional Director issued the D&DE and rejected the Employer’s contention that the petitioned-for unit was comprised of guards. (Ex. A.) The election was held on May 3, 2018, and the Petitioner received a majority of the valid votes cast. On May 16, 2018, the Regional Director certified the Union as the exclusive representative of the petitioned-for unit. (Ex. B.)

III. THE TECHNICIANS ARE STATUTORY “GUARDS”

Section 9(b)(3) of the Act defines a guard as a person employed to “**enforce against employees and other persons rules to protect [the] property of the employer** or to protect the safety of persons on the employer’s premises” *Id.* (emphasis added).

Consistent with the plain language of the statute, the Board has repeatedly held that the definition of “guard” is not limited to notions of a prototypical plant security guard, but includes

³ All cited transcript pages from Joint Exhibit 1 from the pre-election hearing are attached under Exhibit E.

employees who more broadly enforce rules against employees or patrons to protect the Employer's property or assets. For instance, in *A.W. Schlesinger Geriatric Ctr., Inc.*, 267 N.L.R.B. 1363 (1983), the Board considered the "guard" status of two maintenance employees who walked the employer's premises and – in addition to their maintenance duties – were authorized to ask that a trespasser or other employee cease creating a disturbance or that the unauthorized person leave. The Board found that, "although the maintenance employees have no special training as guards and do not wear guard uniforms or carry firearms, we conclude that the two night and weekend maintenance employees are employed for security purposes in addition to their maintenance duties." *Id.* at 1364. Significantly, the Board found that the maintenance employees were responsible for keeping unauthorized persons off the premises, even though they had been instructed to contact a supervisor or law enforcement officer first and to avoid confrontation if possible. The Board concluded that it was "sufficient that they possess and exercise responsibility to observe and report infractions, as this is *an essential step in the procedure for enforcement of the [employer's] rules.*" *Id.* Further, the Board found it "not determinative that [these duties were] not their only function." *Id.*; *see, e.g., Rhode Island Hosp.*, 313 N.L.R.B. 343, 346-47 (1993) (finding that shuttle van drivers were "guards"; "[A]lthough one of their primary duties is to transport employees from building to building, they are also charged with the responsibility of being on the lookout for and reporting security problems or rules violations."); *MGM Grand Hotel*, 274 NLRB 139, 1398-40 (1985) (fire alarm and security system operators fell within statutory definition of "guard" even where sole duties were to observe and report); *Am. Dist. Tel. Co.*, 160 N.L.R.B. 1130, 1136 (1966) ("guard" status is not limited to employees who enforce rules against other employees); *McDonnell Aircraft Co. v. NLRB*, 827 F.2d 324, 326-27 (8th Cir. 1987) (to qualify as a "guard" the performance of guard

duties need not be the employee's only function, and collecting cases holding that "unarmed courier service drivers," "fitting room checkers," "armored car guards," and "receptionists, fire patrolmen, chauffeurs and investigators" were "guards" under the Act); *see also Walterboro Mfg. Corp.*, 106 NLRB 1383, 1384 (1953) ("It is the nature of the duties of guards and not the percentage of time which they spend in such duties which is controlling.").

Similarly, that the Technicians do not themselves personally confront individuals or resolve instances of misconduct is not dispositive in determining guard status. In *Wright Mem'l Hosp.*, 255 N.L.R.B. 1319, 1320 (1980), the Board concluded that ambulance drivers who were "on the lookout for fire, theft, vandalism, and unauthorized personnel" were guards under the Act even though the drivers, upon discovering an irregularity or violation, took "no action on their own" but instead informed a department head who would then take action. The Board reasoned that it was sufficient that the drivers had "responsibility to observe and report infractions," an "essential step in the procedure for enforcement of [the employer's] rules," and that it was "immaterial" that the drivers did not themselves enforce the employer's rules. *See also Local 3, Int'l Bhd. of Elec. Workers v. NLRB*, 1987 WL 14923 at *1 (S.D.N.Y. Jul. 22, 1987) (electronic technicians were guards within the meaning of the Act where they monitored the fire management system and notified the appropriate authorities in the event of a problem); *Tac/temps & Phila. Coca-Cola Bottling Co.*, 314 N.L.R.B. 1142, 1143 (1994) (checkers who simply reported discrepancies in product count to management were not "guards" because they did not actually investigate whether theft occurred or enforce specific rules concerning theft).

In *Boeing Co.*, 328 N.L.R.B. 128 (1999), the Board departed from this precedent, holding that "guard responsibilities include [only] those typically associated with traditional police and plant security functions," such as weapons training, wearing "guard-type" uniforms, and having

authority to “compel” compliance with the employer’s rules. *Id.* at 130. As pointed out by Member Brame in his dissent, the Board’s new formulation of the test for “guard” status was inconsistent with the plain text of the statute, the Eighth Circuit’s decision in *McDonnell Aircraft*, and historic Board precedent. *Id.* at 133-34 (Brame, dissenting). Indeed, the case upon which *Boeing* relied for most of its analysis – *Burns Sec. Servs.*, 300 N.L.R.B. 298 (1990) – had been set aside by the Eighth Circuit in *BPS Guard Servs., Inc. v. NLRB*, 942 F.2d 519 (8th Cir. 1991) before *Boeing* was even issued. Put simply, *Boeing*’s holding that only persons who perform “traditional” police-like functions are guards is poorly reasoned, inconsistent with the plain language of the statute and Board precedent, and has been repeatedly rejected by the federal appellate courts.⁴

Indeed, the D.C. Circuit’s recent decision in *Bellagio, LLC v. NLRB*, 863 F.3d 839, 848-49 (D.C. Cir. 2017), again rejected the Board’s narrow definition of “guard” and found – consistent with the Board’s historic view – that a casino’s surveillance technicians were “guards” under Section 9(b)(3) of the Act. The D.C. Circuit expressly rejected the Board’s argument that the technicians could not be guards simply because they “made no rounds,” and did not carry out functions akin to traditional plant security guards (*i.e.*, they did not confront guests, carried no weapons, and did not wear security uniforms or badges) on the basis that there is no statutory requirement whatsoever that a guard must personally confront other individuals. *See id.* The D.C. Circuit affirmed that it is sufficient that the casino’s technicians play an integral role in effectuating the employer’s rules and policies and that their lack of direct contact with the wrongdoers did “not detract from their guard status.” *Id.* at 849 (quoting *A.W. Schlesinger Geriatric Ctr., Inc.*, 267 N.L.R.B. at 1364). Notably, the fact that the technicians acted at the

⁴ The Board has repeatedly overruled poorly-reasoned precedent when necessary to return to well-established doctrine with a sound basis in the Act. *See, e.g., Hy-Brand Indus. Contractors*, 365 N.L.R.B. No. 156 (2017).

direction of human resources and other supervisory personnel and that their duties to report suspicious activities were shared by all other casino employees did not limit the Court from finding the technicians to be “guards” within the meaning of the Act. The Court’s ruling considered key factors not given due weight by the Board, such as the technicians’ duties in deterring, detecting, reporting, and investigating suspicious activity, the modern context in which their enforcement took place, their role in preventing and investigating misconduct by other employees, and their role in protecting the Employer’s valuable assets generally. *Id.* at 849-52. In particular, the Board failed to give due weight to the “peculiar” context of an “ultramodern luxury casino” and the “technological advance[s]” in hotel-casino security. *Id.* at 850-51. In short, the D.C. Circuit implicitly rejected the Board’s approach in *Boeing* and concluded that, because the evidence, taken as a whole, demonstrated that surveillance technicians “perform an essential step in the enforcement of rules to protect the casino’s property and patrons, including enforcement against their fellow employees” they were guards within the meaning of the Act, notwithstanding their lack of “traditional” guard duties. *Id.* at 849.

Here, the Regional Director committed the same errors as the Board in *Bellagio*. First, the Regional Director disregarded the overwhelming and undisputed evidence that a core function of the Technicians’ duties is to enforce rules against casino guests and other third-parties to protect the Employer’s property and assets. Instead, it focused exclusively on whether the Technician’s perform “traditional” security functions, such as physically confronting guests. For example, in rejecting the Employer’s contention that the petitioned-for unit was composed of guards, the Regional Director acknowledged that the Technicians play an essential role in detecting, investigating and reporting fraud with respect to gaming machines on the Employer’s property and in verifying jackpots against fraudulent payouts, but nonetheless held that “the

Technicians do not confront people but are instead expected to report to the Employer.” (Ex. A.) Likewise, the Regional Director focused on the fact that the Technicians are not interchangeable with the Employer’s more traditional security officers – ignoring that the technicians in *Bellagio* (as well as the ambulance drivers, fitting room checkers, chauffeurs, firemen, and maintenance employees in the cases discussed above) were also not interchangeable with traditional police-like security officers. Most critically, the Regional Director focused on superficial factual distinctions between this case and *Bellagio* – such as that the Technicians are not involved in “sting” operations or that they are not permitted to enter surveillance rooms – but missed the actual point of *Bellagio*: that the statutory definition of “guard” encompasses more than prototypical security officers.

Likewise, the Regional Director failed to consider the context of an “ultramodern luxury casino.” As explained by the Employer’s witnesses, with the evolution from mechanical to electronic slot machines, the role of the Technicians is no longer that of a mechanical repairman. Nor is the primary risk to the Employer’s assets that a casino patron will physically smash a slot machine and flee with a can of quarters. Rather, in the modern context, the danger is unscrupulous individuals who try to take advantage of all aspects of the Employer’s slot machine operation, ranging from the initial bill validation, to fraudulent payouts and tampering, to claims of lost credits, to fraudulent “EZ-Pay” tickets. *See Bellagio*, 863 F.3d at 842, 850-51. Put simply, the evolving nature of the contemporary casino *requires* the Board to consider this context in determining what constitutes a “guard” under the Act. Failing to apply the 9(b)(3) on the facts in this case would be an affirmation of the antiquated views that the Board has consistently refused to enforce in other contexts.⁵

⁵ The Board has consistently recognized that application of the Act in the modern economy requires certain Board policies and doctrines to be reconsidered. *See, e.g., Purple Commc’ns.*, 361 N.L.R.B. No. 126 (2014).

The undisputed evidence is that the Technicians' direct responsibility to protect the Employer's property from such fraud and theft is an essential step in enforcing the Employer's rules and policies. In particular, the Technicians' power to exercise a significant influence over decisions concerning the slot machine operations due to their unique "know-how" and access to the thousands of gaming machines on the property – making up the majority of all gaming activity – makes these Technicians an integral part of the Employer's efforts to safeguard its property and assets. Thus, because they play a special role in enforcing the Employer's rules against "other persons" to protect the Employer's "property" and assets relating to slot machines, they are "guards" within the meaning of the Act.

IV. CONCLUSION

For the reasons set forth above, the Decisions should be set aside and the Petition should be dismissed.

Date: May 25, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify this 25th day of May, 2018, that a copy of the Employer's Request for Review of the Regional Director's Decision and Direction of Election and Certification of Representative, including Exhibits, was electronically served on:

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